IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1537

IRVING MASON, on behalf of himself and all others similarly situated, and derivatively on behalf of C. I. REALTY INVESTORS,

Petitioner,

v.

CITY INVESTING COMPANY, C. I. REALTY INVESTORS, C. I. PLANNING CORPORATION, WILLIAM POLK CAREY, JOHN L. GIBBONS, PETER C. R. HUANG, JAMES V. TOMAI, JR., ROBERT M. MORGAN, WILLIAM S. RENCHARD, FRED R. SULLIVAN, JAMES R. WEBB, and REYNOLDS SECURITIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Questions Presented

1. Whether the shareholders of C. I. Realty Investors are entitled to the protection provided by Fed. R. Civ. P. 23.1 and applicable Massachusetts law, which require a plaintiff to consult with his fellow shareholders before bringing a derivative suit under the federal securities laws.

2. Whether a federal district court in a case brought under the federal securities laws is required to look to the federal law of the transferor forum in applying Fed. R. Civ. P. 23.1 following a transfer by consent pursuant to 28 U.S.C. § 1404(a).

STATEMENT OF THE CASE

A. The Parties

Respondent C. I. Realty Investors ("CIRI" or the "Trust") is a real estate investment trust organized under and pursuant to the laws of Massachusetts. Its shares are listed on the New York Stock Exchange. Respondent C. I. Planning Corporation, an indirectly, wholly-owned subsidiary of Respondent City Investing Company, is CIRI's investment advisor. The individual Respondents are past or present members of CIRI's Board of Trustees. Reynolds Securities, Inc. was one of the underwriters for the Trust's public offering in 1972.

Petitioner Irving Mason allegedly purchased 1,000 Units of CIRI, each containing one Share of Beneficial Interest and one Warrant to purchase one Share.

B. The Amended Complaint

The original complaint in this action, containing both class action and derivative claims, was filed on February 26, 1975 in the United States District Court for the Eastern District of Pennsylvania. The complaint closely paralleled another complaint filed against the same defendants two months before in the same court entitled *David Steinberg et al.* v. *William Polk Carey et al.*, 75 Civ. 1695 (I.B.W.).*

* Counsel for plaintiffs in this action are also counsel for plaintiffs in the *Steinberg* action.

Both actions were subsequently transferred on consent to the United States District Court for the Southern District of New York.

On November 19, 1975 petitioner served an amended complaint. The class action claims, counts I-III and VI, relate to alleged omissions and misrepresentations in the Trust's April 13, 1972 Prospectus and certain additional unspecified documents. The derivative claims herein, counts IV and V, incorporate by reference the factual averments in the first three class action counts and add general conclusory claims of personal enrichment by the respondents. Count IV alleges violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 adopted thereunder and Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n, and Rule 14a-9 adopted thereunder. Count V is brought pursuant to the court's pendent jurisdiction.

C. The Motions Below

On December 12, 1975 respondents moved to stay the class action counts herein on the ground that they were duplicative of those in the *Steinberg* action which were being actively litigated. Respondents also moved to dismiss the derivative counts on the grounds that petitioner had failed to consult with CIRI's shareholders as required by Fed. R. Civ. P. 23.1 and that petitioner could not properly maintain a derivative suit on behalf of the Trust at the same time he was prosecuting a class action against the Trust.

D. The Opinions Below

On May 3, 1976 the United States District Court for the Southern District of New York (Wyatt, J.) issued an order staying the class action counts pending a final determina-

tion of the *Steinberg* action, and dismissing the derivative causes of action on the ground that petitioner had failed to make a demand on the shareholders of CIRI as required by Fed. R. Civ. P. 23.1 and applicable Massachusetts law. The District Court declined to hold that it was obligated to apply the law of the United States District Court for the Eastern District of Pennsylvania, the transferor court, on this issue. The District Court made an express determination that there was no just reason for delay and pursuant to Fed. R. Civ. P. 54(b) entered final judgment in favor of the respondents (Pet., App. B).

On November 9, 1976 the United States Court of Appeals for the Second Circuit unanimously affirmed the order of the District Court (Pet., App. A). On February 18, 1977, the Court of Appeals denied petitioner's petition for rehearing (Pet., App. D).

REASONS FOR DENYING THE WRIT

I.

The Second Circuit Court of Appeals Correctly Decided That Rule 23.1 Requires Petitioner, as a Condition to Maintaining This Derivative Action, to Comply with Applicable Massachusetts Law Requiring Demand on Shareholders.

A. The Rationale and Judicial History Rule 23.1 Support Shareholder Demand in this Case

Fed. R. Civ. P. 23.1 provides in pertinent part:

> "The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority *and, if necessary, from the shareholders or*

> *members, and the reasons for his failure to obtain the action and for not making the effort.*" [Emphasis added.]

1. *The Rule Is an Expression of Long Standing Judicial Policy*

The judicial history of this Rule demonstrates a federal policy that shareholders of a corporation are entitled to decide in the first instance when and under what terms their corporation will become involved in litigation. The Rule recognizes that modern litigation is an extremely time-consuming and expensive proposition, and affords shareholders substantial protection from a plaintiff who, under the guise of being a representative party, would bring a suit purportedly on behalf of the corporation, often in the hope of coercing a quick settlement. Equally important, it expresses the right of a corporation's shareholders in the exercise of their sound business judgment *not* to authorize an action of dubious merit. Conversely, if an action has merit, the Rule gives the shareholders the right to take over the litigation themselves or to direct the corporation to prosecute. Petitioner would have this protection eliminated.

The federal requirement of shareholder demand has its genesis in the Supreme Court's decision in *Hawes* v. *Oakland*, 104 U.S. 450 (1882). There, a shareholder of the Contra Costa Water-works Company sought to maintain a suit on behalf of the corporation against the city of Oakland, California. The Court held that the plaintiff-shareholder was required in the first instance to present its case to all the shareholders of the corporation and explained the reasoning behind this conclusion by quoting from the case of *MacDougall* v. *Gardiner*, 1 Ch. D. 13 (1875):

"Because there may be a great many wrongs committed in a company,—there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, *as a matter of good sense,* they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is a wrong to the company a subject-matter of litigation, or whether it will take steps to prevent the wrong from being done." 104 U.S. at 457. [Emphasis added.]

The Court thus explicitly recognized that there may be situations where the shareholders of a corporation are entitled to exercise their sound business judgment and decide not to prosecute a claim that could arguably be brought. *See also, Corbus* v. *Alaska Treadwell Gold Mining Co.,* 187 U.S. 455 (1903).

2. *The Rule Is Applied in Connection with the Enforcement of Federally Created Rights*

The right of shareholders to be consulted has also been applied by the Supreme Court in cases where there have been claimed violations of federal laws. In *United Copper Securities Co.* v. *Amalgamated Copper Co.,* 244 U.S. 261 (1917), plaintiff brought a stockholders derivative action based on alleged violation of the Sherman Act, 15 U.S.C. § 1, *et seq.* The Court, in an opinion by Mr. Justice Brandeis, held that the suit could not be maintained absent an application to the corporation's shareholders:

"No application appears to have been made to the stockholders as a body or indeed to any other stockholders individually; nor does it appear that there

was no opportunity to make it, and no special facts are shown which render such application unnecessary. For aught that appears, the course pursued by the directors has the approval of all the stockholders except the plaintiffs. *The fact that the cause of action is based on the Sherman Law does not limit the discretion of the directors or the power of the body of stockholders; nor does it give to individual shareholders the right to interfere with the internal management of the corporation.*" 244 U.S. at 264. [Emphasis added.]

3. *The Courts Have Traditionally Looked to State Law on the Issue of Intracorporate Remedies*

Since the Federal Rules are silent on when and under what circumstances shareholder demand is required, Federal Courts have traditionally looked to state law for the substance of the shareholder demand requirement. This approach recognizes that there are no federal articles of incorporation and that the primary responsibility for the regulation of the internal affairs of state-created corporations resides with the states themselves.

The traditional rule is that the law of the state of incorporation determines the rights of a shareholder to participate in the affairs of the corporation:

"The local laws of the state of incorporation will be applied to determine the right of a shareholder to participate in the administration of the affairs of the corporation . . . ." Restatement (Second), Conflict of Laws § 304 (1971).

This rule is based on the principle that all the shareholders of a nationwide corporation are entitled to have their rights and obligations governed by a single body of readily ascertainable law. Since the states have historically

taken the primary responsibility for the regulation of corporations, the federal courts have not attempted to create a federal common law governing corporations. *See,* Restatement (Second), Conflict of Laws, § 304, Comment C (1971); Ehrenzweig, *Conflict of Laws,* § 12 at 38 (1962).

It was this guiding principle which caused Mr. Justice Douglas in *Price* v. *Gurney,* 324 U.S. 100, 106 (1945), to look to the law of the state of incorporation to determine whether shareholders of an Ohio corporation could file an action in Federal Court asking relief under Chapter X of the Bankruptcy Act, 11 U.S.C. § 501:

> "The District Court in passing on petitions filed by corporations under Chapter X must of course determine whether they are filed by those who have authority so to act. In absence of federal incorporation, that authority finds its source in local law. If the District Court finds that those who purport to act on behalf of the corporation have not been granted authority by local law to institute the proceedings, it has no alternative but to dismiss the petition. It is not enough that those who seek to speak for the corporation may have the right to obtain that authority."

This principle was reiterated in *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 549-550 (1949), which although expressed in the context of a diversity action, nonetheless sets forth the Court's view that state law should govern intracorporate relationships:

> "The very nature of the stockholder's derivative action make it one in the regulation of which the legislature of a state has wide powers. Whatever theory one may hold as to the nature of the corporate entity, it remains a wholly artificial creation whose internal relations between management and stockholders are dependent upon state law and may be subject to most complete and penetrating regulation, either by public authority or by some form of stockholder action . . . ."

It was against this judicial background that the Court of Appeals made its decision below.

B. Massachusetts Law Requires Demand on Shareholders

The law of Massachusetts, applied by the Court of Appeals in its decision below, has long required a demand on shareholders as a precondition to bringing a derivative suit on behalf of a Massachusetts corporation. *Brody* v. *Chemical Bank,* 482 F.2d 1111 (2d Cir.), *cert. denied,* 414 U.S. 1104 (1973); *Clairdale Enterprises, Inc.* v. *C. I. Realty Investors,* 75 Civ. 4227 (S.D.N.Y. June 21, 1976) (applying Massachusetts law); *Jones* v. *The Equitable Life Assurance Society of the United States,* 409 F. Supp. 370 (S.D.N.Y. 1975) (applying Massachusetts law); *Heit* v. *Brown,* 47 F.R.D. 33 (D. Mass. 1967); *Pomerantz* v. *Clark,* 101 F. Supp. 341 (D. Mass. 1951) (applying Massachusetts law); *Datz* v. *Keller,* 347 Mass. 766, 196 N.E.2d 922 (1964); *Braunstein* v. *Devine,* 337 Mass. 408, 149 N.E.2d 628 (1958); *S. Solomont & Sons Trust, Inc.* v. *New England Theatres Operating Corp.,* 326 Mass. 99, 93 N.E.2d 241 (1950); *Almy* v. *Almy, Bigelow & Washburn, Inc.,* 235 Mass. 227, 126 N.E. 419 (1920); *Bartlett* v. *New York, N.H. & H.R. Co.,* 221 Mass. 530, 109 N.E. 452 (1915); *Von Arnim* v. *American Tube Works,* 188 Mass. 515, 74 N.E. 680 (1905); *Dunphy* v. *Travelers' Newspaper Ass'n.,* 146 Mass. 495, 16 N.E. 426 (1888); *Greenspun* v. *Lindley,* 44 A.D. 2d 20, 352 N.Y.S. 2d 633 (1st Dep't 1974), *aff'd on other grounds,* 36 N.Y.2d 473, 369 N.Y.S.2d 123 (1975) (applying Massachusetts law); *Wachtel* v. *Baker,* Civ. No. 14772/73 (Sup. Ct., N.Y. Co. 1975) (applying Massachusetts law).

C. The General Policies of the Federal Securities Laws Are Not Impeded by the Shareholder Demand Requirement—a Substantial Question Is Not Presented

Petitioner argues that since the federal shareholder demand requirement sets certain preconditions to the right of a single shareholder to bring a derivative action under the federal securities laws it is therefore in conflict with those laws (Pet., pp. 13-16). The fact is, however, that both Rule 23 and Rule 23.1 were *designed* to place specific limitations on plaintiffs seeking to embroil their corporations in litigation through class and derivative actions. *E.g., Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 371, *reh. denied*, 384 U.S. 915 (1966). Congress was presumably well aware of the federal shareholder demand requirements when it passed the Securities Act of 1933 and the Securities Exchange Act of 1934: *Hawes* v. *Oakland*, 104 U.S. 450 (1882), embodying the principle of shareholder demand, was decided almost 50 years prior to the passage of these laws, and the applicability of these requirements to federal enactments was made clear in *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U.S. 261 (1917). Congress could have passed legislation which would have provided that the right of a shareholder to bring a stockholder derivative action under the federal securities laws would not be subject to curtailment by the corporation's shareholders. Since there is no indication that Congress intended to exempt litigation under the federal securities laws from the requirements of Rule 23.1 it would be error to do so now under the guise of judicial construction. *See Davies Warehouse Co.* v. *Bowles, Price Administrator*, 321 U.S. 144 (1944).

Implicit in the policy behind Rule 23.1 is the recognition that derivative actions are potentially extremely costly to the corporation both in terms of management's time and attorneys' fees. Since this is a substantial multi-defendant

case, if the suit goes forward the Trust can reasonably expect to go through a period of extensive discovery, a long trial and, if necessary, an appeal. If petitioner is unsuccessful in proving his claims, the indemnification provisions in the Trust's Declaration of Trust provide that the Trust will also be liable for all the attorneys' fees and expenses of the Trustee defendants. The Court can take judicial notice that the cost of this litigation will run into the tens of thousands of dollars which must, of course, ultimately be absorbed by all the shareholders of the Trust. On the other hand, the financial expense to the petitioner of making a demand on the Trust's shareholders is hardly comparable: at present postal rates, it will cost $1,040 to send a mailing to the Trust's approximately 8,000 shareholders not counting whatever minimal expense would be involved in preparing the material.

Many courts have recognized that the extra cost and effort involved in communicating with a corporation's shareholders are outweighed by the policy of allowing the shareholders to exercise their informed business judgment against frivolous lawsuits. *See, Pomerantz* v. *Clark*, 101 F. Supp. 341 (D. Mass. 1951); *Jones* v. *The Equitable Life Assurance Society of the United States*, 409 F. Supp. 370 (S.D.N.Y. 1975); *Bruce & Co.* v. *Bothwell*, 8 F.R.D. 45 (S.D. N.Y. 1948). The claim of undue burden as a basis for excusing shareholder demand has also been rejected in the Fifth Circuit (*Stone* v. *Holly Hill Fruit Products, Inc.*, 56 F.2d 553 (5th Cir. 1932)), the Sixth Circuit (*Haffer* v. *Voit*, 219 F.2d 704 (6th Cir. 1955)) and the Eighth Circuit (*Quirke* v. *St. Louis-San Francisco Railway Co.*, 277 F.2d 705 (8th Cir. 1960)). *See also, Varanelli* v. *Wood*, 9 F.R.D. 61 (S.D.N.Y. 1949); *Greenspun* v. *Lindley*, 44 A.D. 2d 20, 352 N.Y.S.2d 633 (1st Dep't 1974), *aff'd on other grounds*, 36 N.Y.2d 473, 369 N.Y.S.2d 123 (1975); 3B Moore, *Federal Practice* ¶ 23.1.19 at 23.1-258 (2d ed. 1975).

There is no policy of the federal securities laws to promote unchecked litigation as petitioner claims. Rule 23.1 places important restrictions on the proper enforcement of the federal securities laws and is in accord with the policy of these laws to encourage informed decision-making by CIRI's shareholders.

D. The Purported Conflict in the Circuits Does Not Justify Granting the Writ

Petitioner incorrectly contends that the decision below is in direct conflict with the law of the Third Circuit (Pet., pp. 10-11, 13). The cases cited by petitioner establish no such conflict. In *Rogers* v. *American Can Co.*, 305 F.2d 297 (3d Cir. 1962), the Third Circuit approved the District Court's decision dismissing the plaintiff's complaint for failure to make a demand on shareholders. And *McClure* v. *Borne Chemical Co.*, 292 F.2d 824 (3d Cir. 1961) (state security for expenses statute), and *In re Pittsburgh & Lake Erie R.R. Co. Sec. & Antitr. Lit.*, 543 F.2d 1058 (3d Cir. 1976) (standing of an indenture trustee to object to a derivative settlement) do not involve the question of shareholder demand.

The *McClure* decision rests upon facts and reasoning unique to security for expense statutes. In that case, the Third Circuit accepted the view of Professors Hart and Wechsler that federal law is "interstitial" in character and that it "builds upon legal relationships established by the states." 292 F.2d at 831. The Court reasoned as follows:

> "One of the most important factors in those cases applying state law to federally-based causes of action has been a presumption that Congress has acted with established state doctrine in mind and has thus intended that state law be 'absorbed' into the federal statute. See, e.g., Davies Warehouse Co. v. Bowles, 1944, 321 U.S. 144, 64 S. Ct. 474, 88 L.Ed. 635. In the instant case, however, the Securities Exchange Act of 1934 was enacted over a decade before the first state security for expenses statute. It cannot be argued successfully therefore, that Congress had these statutes in mind as a background against which it enacted the Exchange Act." 292 F.2d at 833.

These facts are far different in the case of shareholder demand, which was recognized as early as 1882 in *Hawes* v. *Oakland*, 104 U.S. 450, over 50 years before the Securities Exchange Act of 1934 became law.

Unlike the security for expense statutes, the shareholder demand requirement is a fundamental and traditional principle of law finding support in numerous other jurisdictions. *Wathen* v. *Jackson Oil & Refining Company*, 235 U.S. 635 (1914); *Rogers* v. *American Can Co.*, 187 F. Supp. 532, 537 (D.N.J. 1960), *aff'd*, 305 F.2d 297 (3d Cir. 1962); *Quirke* v. *St. Louis-San Francisco Railway Co.*, 277 F.2d 705 (8th Cir.), *cert. denied*, 363 U.S. 845 (1960); *Haffer* v. *Voit*, 219 F.2d 704 (6th Cir. 1955); *Long* v. *Stites*, 88 F.2d 554 (6th Cir.), *cert. denied*, 301 U.S. 706 (1937); *Stone* v. *Holly Hill Fruit Products Inc.*, 56 F.2d 553 (5th Cir. 1932); *Watts* v. *Vanderbilt*, 45 F.2d 968 (2d Cir. 1930); *Heinz* v. *National Bank of Commerce*, 237 Fed. 942 (8th Cir. 1916); *Macon, D. & S. R. Co.* v. *Shailer*, 141 Fed. 585 (5th Cir. 1905); *Robinson* v. *West Virginia Loan Co.*, 90 Fed. 770 (C.C.D. W. Va. 1898); *Dannemeyer* v. *Coleman*, 11 Fed. 97 (C.C.D. Cal. 1882); *Varanelli* v. *Wood*, 9 F.R.D. 61 (S.D. N.Y. 1949); *Bruce & Co.* v. *Bothwell*, 8 F.R.D. 45 (S.D.N.Y. 1948); *Abraham* v. *Parkins*, 36 F. Supp. 238 (W.D. Pa. 1940); *Caldwell* v. *Eubanks*, 326 Mo. 185, 30 S.W.2d 976 (1930); and *Porter* v. *Mesilla Valley Cotton Products Co.*, 42 N.M. 217, 76 P.2d 937 (1937).

The only Court of Appeals decision arguably in conflict with the decision below is the First Circuit's decision in

Levitt v. *Johnson*, 334 F.2d 815 (1st Cir. 1964), *cert denied*, 379 U.S. 961 (1965). In *Levitt*, the court held that federal law governed the issue of shareholder demand in an action brought under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, and that, where a company has a large number of shareholders, no such demand is required. *Levitt* is inconsistent with the Supreme Court's decisions in *Hawes* v. *Oakland*, 104 U.S. 450 (1882), *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U.S. 261 (1917), and *Price* v. *Gurney*, 324 U.S. 100 (1945), and with the language and judicial history of Rule 23.1.

Levitt tries to distinguish *United Copper Securities Co., supra*, where shareholder demand was required in a case under the Sherman Act, by stating that the policy of the antitrust laws is the protection of competing businesses, as businesses, while the Investment Company Act was designed to protect individual investors. 334 F.2d at 820, n. 5. Not only does this attempted distinction involve an unduly narrow statement of the policy behind the Sherman Act, *see e.g., Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4 (1958), but it leads to the extraordinary situation that under *Levitt* the requirement of shareholder demand is to be determined on a completely *ad hoc* basis depending on a federal court's interpretation of the policy behind a particular federal statute. Finally, its exemption of "large corporations" from the protection of Rule 23.1 has the unsupportable effect of differentiating between "large" and "small" corporations in a manner not authorized by Rule 23.1 or by any of the Supreme Court's decisions on this subject.

The continuing validity of *Levitt* in the First Circuit in cases alleging violation of the federal securities laws is brought into question by the later District Court decision in *In re Kauffman Mutual Fund Actions*, 56 F.R.D. 128

(D. Mass. 1972), *aff'd on other grounds*, 479 F.2d 257 (1st Cir.), *cert. denied*, 414 U.S. 857 (1973). In *Kauffman*, plaintiff brought derivative actions against sixty-five mutual funds and thirty-eight investment advisors managing these funds claiming violation of the federal antitrust laws, the Investment Company Act of 1940, the Securities Exchange Act of 1934 and the Investment Advisors Act of 1934. Two of the Massachusetts fund defendants moved to dismiss the antitrust claims on the ground that plaintiff had failed to make a shareholder demand under Rule 23.1. The District Court granted defendants' motion and rejected plaintiff's argument that shareholder demand was excused because the defendants' shareholders could not ratify the alleged wrongs and the requirement was impossibly burdensome. 56 F.R.D. at 136-140. The court distinguished *Levitt* on the ground that the First Circuit's decision was limited to cases brought under the Investment Company Act.

II.

The Second Circuit Court of Appeals Correctly Decided That the Transferee Court Is Not Required to Look to the Law of the Transferor Forum in Applying Rule 23.1.

Petitioner claims that the Court below, as the transferee court under 28 U.S.C. § 1404(a), should have applied the law which the transferor forum arguably would have applied and that this would have resulted in a refusal to construe Rule 23.1 as requiring application of Massachusetts law. (Pet., pp. 16-17). Under Petitioner's theory *every* issue in this litigation would be resolved by reference to another federal jurisdiction's laws. There is no rule of law supporting such an approach. If followed, it would produce wholesale forum shopping within the federal sys-

tem in cases involving antitrust and securities matters in which actions may be brought in virtually any district court in the country.

The whole point of *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964), and the other cases upon which petitioner relies, is to preserve the principles established by *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), *Klaxon Co.* v. *Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941), and *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945), that in diversity cases, the federal court should be no more than another court of the forum state, and that the state law of the transferor forum should apply. 376 U.S. at 637-39. The *Van Dusen* case, accordingly, stands only for the proposition that when convenience would be served by a transfer the plaintiff should not thereby lose the benefit of the substantive state law upon which his case is based.

These principles do not apply when the issue is an interpretation of *federal* law such as the construction of Rule 23.1. As Judge Lumbard (then Chief Judge) stated in *H. L. Green Co.* v. *MacMahon*, 312 F.2d 650 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963), which presaged the holding of *Van Dusen* v. *Barrack*:

> "[I]nsofar as the federal courts apply state law, they apply the laws of fifty separate jurisdictions, rather than one . . . . [A] plaintiff may not resist the transfer of his action to another district court on the ground that the transferee court will or may interpret federal law in a manner less favorable to him . . . . *The federal courts comprise a single system applying a single body of law, and no litigant has a right to have the interpretation of one federal court rather than that of another determine his case.*" 312 F.2d at 652. [Emphasis added.]

See also, Clayton v. *Warlick*, 232 F.2d 699, 706 (4th Cir. 1956); *Scheinbart* v. *Certain-Teed Products Corp.*, 367 F. Supp. 707, 711 (S.D.N.Y. 1973); *Polaroid Corporation* v. *Casselman*, 213 F. Supp. 379, 383-84 (S.D.N.Y. 1962). Any contrary interpretation would be completely destructive of the principle that federal district courts apply a uniform system of federal laws.

Finally, it should be noted that it is by no means clear that the Third Circuit, the transferor jurisdiction here, would dispense with shareholder demand in this case. In *Rogers* v. *American Can Co.*, 305 F.2d 297 (3d Cir. 1962), the Third Circuit approved the District Court's original decision which required that the plaintiff comply with the shareholder demand requirement before bringing suit under the Clayton Act. This is persuasive—if not conclusive—authority that the Third Circuit would also dismiss this case. *See also, Abraham* v. *Parkins*, 36 F. Supp. 238 (W.D. Pa. 1940) (suit dismissed for failure to comply with shareholder demand provisions of Rule 23(b)).

CONCLUSION

The Petition should be denied.

Dated: New York, New York
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Respectfully submitted,

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